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No. 93-1903

Supreme Court, U.S.
FILED
JUN 30 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ISSIAH ROSS, JR., TABITHA HERRING, JAMES C. HOMER, JOHNNIE LEE PALMS, GERRY PLANT, WILLIAM MORGAN PORTER, VERNON ALEXANDER PUTMAN, GEORGE RUMPH, FRANKLIN ROOSEVELT SCOTT, EDDIE SLAUGHTER, JOHN W. TAYLOR, NANNETTE TYSON and HOSEY J. WHITE, JR.,

Petitioners,

v.

BUCKEYE CELLULOSE CORPORATION,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED†

1. Whether a defendant in a discriminatory-treatment case under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 is required to produce any specific type of evidence to rebut a *prima facie* case of discrimination when it articulates legitimate, non-discriminatory reasons for the actions it has taken.

2. Whether a district court's exercise of its broad discretion to exclude testimony regarding terminations and other alleged discriminatory conduct which occurred at a different plant and occurred years prior to the start-up of the plant where the plaintiffs were employed constitutes reversible error.

3. Whether a plaintiff alleging disparate impact under Title VII must have filed a charge of discrimination with the EEOC within 180 days of the last day on which the challenged neutral policy was applied.

†One of Petitioner's Questions Presented, namely, question number 10, is not addressed in this brief. Respondent does not concede its validity but submits that it is more than adequately answered by the Eleventh Circuit.

RULE 29.1 LISTING

The parent company of Respondent, The Buckeye Cellulose Corporation (now known as The Procter & Gamble Cellulose Company), is The Procter & Gamble Company. The Procter & Gamble Cellulose Company has one subsidiary, Procter & Gamble Cellulose (1988), Ltd.

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TO THE HONORABLE SUPREME COURT:

The Respondent, Buckeye Cellulose Corporation, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 980 F.2d 648 (1993).

STATUTORY PROVISIONS

In addition to 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, *et seq.*, Respondent submits that Rule 403 of the Federal Rules of Evidence is significant.

> **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time.**
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Since both procedural and evidentiary facts are relevant to this case, Buckeye will present both a procedural history and succinct summary of some of the record evidence pertinent to the issues involved in this Petition.

A. History Of Procedural Developments.

On August 23, 1985, Eddie Slaughter,[1] an employee at Buckeye Cellulose Corporation's Flint River plant,[2] filed a race discrimination suit under Title VII and § 1981 in the Northern

[1]All of the Petitioners are current or former employees at Buckeye's plant located in Oglethorpe, Georgia. In most cases throughout this brief, the Petitioners shall be referred to, either individually or collectively, as Plaintiffs. If it is necessary to identify any particular plaintiff or plaintiffs, they shall be referred to by name.

[2]Respondent's corporate name was changed in 1988 to "The Procter & Gamble Cellulose Company." Hereinafter, the Respondent shall be referred to as Buckeye.

District of Georgia. On March 7, 1986, Issiah Ross, Jr., filed a similar suit in the Middle District of Georgia. On December 19, 1986, eleven additional identical suits were filed in the Southern District of Georgia.[3]

In mid-1987, Buckeye filed a motion to consolidate the cases.[4] Since Plaintiffs opposed consolidation, the district court issued an order on February 11, 1988, confirming that one case, *Ross v. Buckeye*, would be tried separately and in its entirety before the motion as to consolidation of the remaining cases would be addressed.[5] The *Ross* trial commenced on June 6, 1988. After several days of testimony, the district court concluded that the other cases should be consolidated and declared the June 6 trial a mistrial.

During the course of the June 6 trial, Plaintiffs attempted to offer into evidence testimony regarding events which occurred at a Buckeye plant located in Foley, Florida. When Buckeye objected to this evidence, there was a chambers conference[6] to review in detail the admissibility of any evidence regarding the Foley plant. The district court sustained the objection and ruled that the evidence would not be admitted.

The district court set September 6, 1988, as the trial date for the consolidated cases. On August 31, 1988, there was a

[3]All of the suits filed outside the Middle District of Georgia were transferred to that District.

[4]R1-11. Buckeye will cite to the record on appeal following the same record designations it used in its briefs to the Eleventh Circuit. All pleadings, discovery, hearing and jury trial transcripts, and all exhibits admitted into evidence during the proceedings in these cases were made part of the record on appeal.

[5]R2-38.

[6]R10-84-1-2. Though the content of this conference was not transcribed, it is clear that this evidentiary issue was raised and analyzed by the district court. The importance of this being that, as early as June of 1988, the district court was already well aware of the issues in the case and the evidence which Plaintiffs wanted to introduce regarding the Foley plant.

status conference regarding the consolidated cases. At this status conference, the district court and Buckeye were made aware of the suit filed by Rumph and Tyson alleging violations of § 1981.[7]

During the course of this August 31, 1988 status conference, two significant issues directly related to this Petition were raised. The first issue, namely, the admissibility of evidence concerning what had allegedly occurred at the Foley plant, via testimony of Jimmy Hughes, was discussed. Buckeye again objected to the admissibility of the evidence and what Hughes had to say regarding the Foley plant. In response to this objection, the district court noted that it had previously ruled that such evidence would not be admitted. The second issue concerned disparate impact. In response to a question from the district court, Buckeye's counsel responded, "I don't think [Plaintiffs have] any basis for recovering under career plans since that is clearly outside the statute of limitations."[8] Thus, Plaintiffs were on notice that Buckeye intended to pursue the statute of limitations defense.

The jury trial segment of the consolidated cases, which by this time had become known as *Ross, et al.*, did begin on September 6, 1988.[9] The jury trial continued throughout the months of September, October, November and December of 1988. Throughout those four months, testimony and other evidence was presented during nearly sixty actual days of trial. The transcript of this part of this case exceeded 10,000 pages. Seventy-three witnesses testified and over 500 exhibits were admitted into evidence.

[7]This joint action was filed on August 28, 1988.

[8]R11-156-4.

[9]Rumph's and Tyson's § 1981 cases were also consolidated for trial. Two of the original cases were excluded from the consolidation for reasons not relevant to this Petition. Thus, the thirteen cases of the Petitioners listed in this case were the ones which proceeded to trial.

Prior to the conclusion of the jury trial portion of this case, the district court, on December 12 and 13, 1988, advised the parties that the Title VII disparate impact segment of the case would not be concluded at the end of the § 1981 jury trial. The district court specifically stated that it intended to hold additional evidentiary hearings regarding the disparate impact theory. The district court also explained that it would require both oral arguments and briefs concerning disparate impact.[10]

At the conclusion of Buckeye's case at the jury trial, Buckeye filed a motion for directed verdict and a lengthy memorandum in support of its motion.[11] Buckeye moved, *inter alia*, for dismissal of the § 1981 claims since they did not constitute continuing violations and because they were separate, distinct acts which fell outside of the statute of limitations applicable to § 1981.

On May 1 and 2, 1989, the district court heard additional testimony regarding disparate impact. On June 28, 1989, oral arguments regarding the disparate impact theory were conducted. The parties also briefed the disparate impact issue. The parties later briefed the issue as to liability under the disparate impact theory. On September 24, 1990, a hearing was held regarding damages for those six Plaintiffs whom the district court had found to have been disparately impacted.[12] Final judgment was entered in these cases on June 28, 1991.[13]

B. Record Evidence Developed During Proceedings.

During the course of the jury trial, the entire history of the Flint River plant was developed since it related directly to the pay issues. Parts of that history relevant to the present case show that the Flint River plant was a new facility. The first

[10]R55-8922-24; R56-9235.

[11]R3-95-14-16.

[12]1SR3/1991-220-1.

[13]1SR2/1991-255-1.

employees[14] were hired on December 3, 1979. The majority of the workforce was hired in the Summer of 1980.

The Flint River plant was operated under what is known as a "technician" system, which included, among other unique aspects, a non-traditional pay system which was specifically designed to break away from strict job classifications and designed to offer varying job responsibilities to the employees.[15]

The initial step in accomplishing this occurred during the hiring process. Applicants were offered a job in either maintenance or process. Process included all jobs at the plant except maintenance or clerical positions. Other than that basic hiring delineation, no applicant was hired for a specific job or a specific unit.[16] After being hired, each employee went through an extensive 10-13 week orientation process to familiarize the employee with the various operating units and the numerous job functions within those units, as well as introduce the employees to the concept of the technician system, career plans and the unique pay system.[17] Each member of each hire group went through this orientation process, both in large and small group meetings.[18] The new employees were told that some job functions were more important than others and, as a result, there would need to be more skills in a career plan in units with less valuable skills in order to match the pay in the other units that had more valuable skills.[19]

[14]The Flint River non-management employees were referred to as "technicians." Thus, the term "technician" and employee are synonymous and may appear in either form throughout this case.

[15]R53-8492-8525; R45-6947-7004.

[16]Unit is the term Buckeye used to designate a specific area of the plant. The term "unit" is the equivalent of the more traditional designation of department.

[17]R45-6958-70; Exhibit D-45.

[18]R37-5505, 5570-71.

[19]R37-5505-06; 5571.

There were numerous job assignments for each operating unit. For the entire plant, there were forty specific job functions directly related to production work. These were known as "skills" or "skill areas." In addition to the production skills, there were job assignments known as "support skills." There were thirteen support skills.[20] During the plant's initial start-up, each employee was performing one of these "skill areas." It was during the first career planning procedure that the employees became eligible to have several "skill areas" placed in their career plans.

In preparation for the first career planning process, all of the various components of the pay system were covered with all employees during four different plantwide training meetings.[21] By April and May of 1981, all employees were provided with examples of career plans and what pay curve could be expected from such a career plan.[22] All employees also knew at this early date that career plan revisions could result in assignment to a higher or lower pay curve depending on the value of the revised career plan.[23] Thus, when the first career planning process actually began in the Summer of 1981, all of the employees had a detailed understanding of how the pay system was designed and how it would work.

A "career plan" identified the specific skill areas which the employees were expected to learn. The career plan was an official document. This one-page document listed each specific skill area to which an employee was assigned. Each career plan had a specific effective date and an employee's job responsibilities did not change unless the career plan was changed. The career plan was reviewed with each employee and made a

[20]D-12.

[21]R45-6692-93.

[22]R46-7076.

[23]Exhibit D-46.

permanent part of the employee's personnel file.[24] Each employee received a career plan which applied only to that employee. Though two or more employees could have the same or similar career plans, it was the specific career plan assigned to a specific employee which determined what that employee's pay was going to be. Pay was based on the value of each career plan.

Many factors went into determining what skill areas would be assigned to any given career plan. The system was designed to have employees add to their initial job assignment by learning related jobs within the confines of Buckeye's needs to run the business. In order to do this, each unit developed an "ideal team skill mix" which identified the staffing needs over an eighteen to twenty-four month period.[25]

The next step, after the career planning process had been explained to all of the employees, was to begin gathering information regarding each employee's performance during the first year of employment.[26] Performance played an integral part in determining what skills would be included in a career plan. In addition, each employee was interviewed by his or her manager to determine what the employee was interested in learning. Employee preference was also an important part in assigning the various skill areas to be contained in a career plan.

[24]Every available career plan for every employee, either current or terminated, was introduced into evidence.

[25]The ideal team skill mix is analogous to a manning schedule. This determines how many skills are needed to properly run a shift. These skills were then allocated to the employees on a per-team, per-unit basis.

[26]This was confirmed by the testimony of those managers who were at the plant during the initial career planning process. *See, e.g.,* Miller at R45-7014-15; McDermott at R53-8500-03; Aiken at R53-8565-66; Hart at R47-7241; Sims at R37-5509-10; Johnson at R50-7842-43; Peters at R42-6469-84.

After the completion of all of these procedures, all employees received their official career plan. After the career planning process was completed, each career plan was reviewed with each individual employee and with all other employees on that employee's team.[27] Thus, all of the employees on any given team knew the content of the career plans of each of the other team members.[28]

Prior to the second plantwide career planning session, several things had transpired. First, the ideal skill mix for each team was re-examined and redefined. Also, the pay system was changed by providing a point value to each of the skill areas. The "point" system provided management with a more accurate means of valuing and costing the career plans.[29]

In the Summer of 1982, all employees went through a second career planning. This second career planning followed the same procedures as did the first. Each employee was interviewed by his or her team manager to ascertain what skills the employee, based on qualifications and the employee's performance, might be interested in acquiring. The skills available were, as was true during the first career planning session, determined by the ideal team skill mix. The proposed career plan was then submitted to the unit management team for review to ensure that the new career plan was appropriate for the employee and reflected the employee's skills, abilities and performance in comparison with the other employees in the unit.[30]

[27]The term "team" as used by Buckeye is not the typical euphemism used at many plants. In general, each unit at the Flint River plant had four teams. Each team represented that group of employees who were needed to operate the plant during any given shift. Each team consisted of fifteen to twenty employees.

[28]Exhibit D-50 at 8, 10, 14; R42-6478.

[29]R53-9406-98; R54-8831-32.

[30]R48-7453-81; Exhibit D-1 at 30-36, 47.

The decision as to what career plan would be assigned to any specific employee was not made by an individual member of management. All career plans were initially reviewed and prepared by the team manager of the team to which an employee was assigned. After that, all of the career plans for all of the teams in a given unit were presented to and reviewed by the unit management team which consisted of all of the managers assigned to that unit. After the unit management team had reviewed the proposed career plans, they were submitted to the Pay and Progression Review Board, which consisted of representatives from each unit and representatives from the Industrial Relations Department (IRD). There was, therefore, no single individual which was responsible for making the decision as to what career plan an employee would receive.

For various reasons, including a failure to achieve anticipated production results, the pay system was put on hold. As a result, the career planning process was abolished. This freeze of the pay system applied to every employee in the plant. The only changes in pay after that point, until after 1987, were across-the-board increases which applied equally to everyone.

Throughout the course of the jury trial, numerous managers, including team managers, unit managers, IRD managers and the plant manager, provided evidence regarding now only how the career planning process was carried out but also provided specific information as to why various Plaintiffs received the career plan that he or she received. The entire personnel file of each Plaintiff, as well as those of many other employees, were also introduced into evidence. Numerous witnesses for Buckeye, both management and non-management employees, provided testimony regarding information contained in the personnel files, as well as other information relating to the job performance of the Plaintiffs and other employees. In addition, all of the Plaintiffs testified at length as to why they thought they should have received a better career plan than that actually received.

REASONS FOR DENYING THE WRIT

1. No Decision Of This Court Or Of Any Court Of Appeals Requires A Defendant, When Articulating Legitimate, Non-discriminatory Reasons For The Actions Taken, To Produce A Specific Type Of Evidence To Rebut A Plaintiff's *Prima Facie* Case Of Intentional Discrimination Under Title VII Or § 1981.

This Court, in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. —, 113 S. Ct. —, 125 L. Ed. 2d 407 (1993), re-examined and explained in detail the "burden" placed on a defendant when it articulates its legitimate, non-discriminatory reasons for the actions taken in regard to a § 1981 discriminatory-treatment plaintiff.[31] Though there was obviously disagreement as to the significance of the rebutting evidence, this Court confirmed that twenty years of precedent still only requires a defendant to articulate a legitimate, non-discriminatory reason for the actions it has taken in regard to a plaintiff. Thus, the legal principles established in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), are as viable now as they were on the days when the decisions were rendered.

It is clear, therefore, that once a plaintiff has established a *prima facie* case of discrimination, the employee's burden is merely "to articulate some legitimate, non-discriminatory reason" for its adverse employment action to rebut any inference of discrimination. *McDonnell Douglas*, 411 U.S. at 802. As this Court stated in *Burdine*:

[31]This Court clarified in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), that the Court's framework for allocation of the burden of production and the order for presentation of proof in Title VII claims is also applicable to § 1981 claims.

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons.[32]

This Court in *Hicks*, in both the majority and dissenting opinions, confirmed the former holdings that this "shift" does not in any way affect the plaintiff's ultimate burden. The *Hicks* Court noted:

> It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff,". . . .[33]

Despite this Court's clear explanations of a defendant's burden of production, Plaintiffs now argue that, because Buckeye did not present a specific type of evidence during the § 1981 jury trial, the district court erred in not granting their motions for directed verdict or J.N.O.V.

In denying Plaintiffs' motions, the district court observed,

> Without now regurgitating over three months of trial testimony and evidence, the court finds that the evidence and inferences do not point so strongly in Plaintiffs' favor that reasonable minds could not reach a contrary verdict. *Fair-minded, impartial men could*

[32] *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 254.

[33] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. —, 113 S. Ct. —, 125 L. Ed. 2d at 416 (emphasis in original).

> *easily reach the verdict reached by the jurors in these actions.*[34]

On appeal, the Eleventh Circuit noted that Plaintiffs admitted that Buckeye introduced evidence explaining why it had taken various actions in regard to the Plaintiffs and why the Plaintiffs were given the career plans that they were given, which, in turn, ultimately resulted in Plaintiffs receiving the pay which they received. Based on those facts, the Eleventh Circuit reiterated the district court's finding that the record in the case made it abundantly clear that the case was properly before the jury to determine whether or not the Plaintiffs had been subjected to intentional discriminatory treatment.[35]

It is fatal to Plaintiffs' Petition on this issue that Plaintiffs' arguments are not arguments of law but are only arguments of fact. Plaintiffs are asking this Court to review the facts, the very same facts which were presented to the jury, and then reach its own conclusion as to whether or not the jury was correct in finding that Buckeye had not intentionally discriminated against the eleven Plaintiffs on whose behalf this § 1981 issue has been raised. In effect, Plaintiffs are asking this Court to sit as a trier of fact. It goes without saying this is an untenable position.

Plaintiffs do not contend that Buckeye did not articulate some reasons for the actions it took. Nor do Plaintiffs contend that the jury, the district court or the Eleventh Circuit found that these articulated reasons were not the true reasons for the actions taken by Buckeye. Plaintiffs merely claim that Buckeye cannot rebut a *prima facie* case because it did not produce a "decisionmaker" as to why the Plaintiffs were paid the way that

[34]Order dated April 10, 1989. R4-141-3. (Emphasis added).

[35]Appendix Vol. 1 at 22-23.

they were. Even if this statement were true, which it is not,[36] Plaintiffs still have provided no support for a contention that either the district court or the Eleventh Circuit failed to properly apply the mandates of this Court in *McDonnell Douglas*, *Burdine* and *Hicks*.

Plaintiffs have failed to cite any case authority for the position that they now take. The authority cited by Plaintiffs does not support their unique theory. Indeed, for the most part, the cited authority is not even relevant to the issue.[37] Curiously, the one case of possible significance cited by Plaintiffs does not support their position but that of Buckeye. In *Lincoln v. Board of Regents*, 697 F.2d 928 (11th Cir. 1983), the court noted, "The defendant's evidence is sufficient if it 'raises a genuine issue of fact as to whether it discriminated against the plaintiff'. The defendant must raise an issue of fact by means of admissible evidence, however, and averments in pleadings are insufficient."[38] Thus, the Eleventh Circuit made it abundantly clear that a defendant's burden is only of production and not a heavy burden. Indeed, the only requirement is that a defendant present "admissible evidence" as to the actions it took.

[36]The record in this case contains page after page of testimony of the managers who were involved in the career planning process who explained in detail exactly how that was done and why the Plaintiffs received the career plans that they received. Since the Plaintiffs' pay was tied directly to the career plan, there is no question but that the "decision-makers" did testify as to why the Plaintiffs received the pay that they did. As noted by the Eleventh Circuit, "The transcript of the four-month trial. . .is full of conflicting testimony regarding the motivations of Buckeye's decision-makers." (Appendix Vol. 1 at 23).

[37]*Mitchell v. Baldridge*, 759 F.2d 80 (D.C. Cir. 1985)(F.R.C.P. 41(b) motion at end of plaintiff's case); *Nantz v. Barrows Co.*, 660 F.2d 1327 (9th Cir. 1991)(defendant offered no reason for action taken); *EEOC v. American Nat'l Bank*, 652 F.2d 1176 (4th Cir. 1981)(pattern and practice disparate impact case).

[38]*Lincoln v. Board of Regents*, 697 F.2d at 937. (Citations omitted).

There is no question from either the district court's orders or the Eleventh Circuit's decision that Buckeye met this burden. Plaintiffs are simply complaining that the jury reached an unfavorable verdict, yet, the arguments that Plaintiffs raise here are the exact same arguments that they presented to the jury. The jury rejected those arguments, as did the district court and the Eleventh Circuit.

The cases cited by Plaintiffs do not suggest any conflict in the circuits regarding the proper interpretation or application of relevant case law and the Eleventh Circuit's holding in this case. In fact, to find Plaintiffs' arguments tenable would call for not only a reversal of hundreds of decisions of the various circuits but also reversal of this Court's holdings in *McDonnell Douglas*, *Burdine* and *Hicks*. Plaintiffs are suggesting that there is some bright line standard for measuring the sufficiency of the evidence establishing a defendant's legitimate, non-discriminatory reasons for the actions taken. This bright line standard can then be used to not only, as a matter of law, establish pretext but also, as a matter of law, relieve a plaintiff of its ultimate burden of establishing that the complained of acts were intentionally discriminatory. Such reasoning would truly set aside "two decades of stable law in this Court. . . ."[39]

2. District Courts Retain Broad Discretion Under Rule 403 To Exclude Evidence Where The District Court Has Found That The Probative Value Is Substantially Outweighed By the Danger Of Unfair Prejudice, Confusion Or Misleading A Jury Or Will Cause Undue Delay In The Adjudication Of The Case.

Plaintiffs have misunderstood or mischaracterized the Eleventh Circuit's holding in regard to the admissibility of the evidence concerning events at the Foley plant. Contrary to

[39] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. —, 113 S. Ct. —, 125 L. Ed. 2d at 428.

Plaintiffs' assertion, the Eleventh Circuit did not hold such evidence to be inadmissible. In fact, the Eleventh Circuit specifically stated, "[T]hat evidence of 'derogatory remarks indicative of a discriminatory attitude' are generally admissible to prove discriminatory treatment."[40] What the Eleventh Circuit did hold was that, based on the particular facts of this specific case, it did not find that the district court abused its discretion by excluding the testimony.

It is axiomatic that a district court must be able to control the trial of a case. As part of this responsibility, the district court has broad discretion to determine the admissibility of evidence and to exclude evidence which the district court finds contrary to the safeguards established in Rule 403, which is specifically designed to give a district court a wide latitude in controlling the case. The reason for this is obvious since "trial judges are much closer to the pulse of a trial than [appellate courts] can ever be, and 'broad discretion' is necessarily accorded them in balancing probative value against prejudice." *United States v. Juarez*, 561 F.2d 65, 71 (7th Cir. 1977).

At issue in the present case are various segments of testimony of Jimmy Hughes, a black manager formerly employed by Buckeye. Hughes was first employed by Buckeye at its Foley, Florida plant in 1973. Hughes transferred to the Flint River plant in 1979. Hughes's employment at the Flint River plant was terminated in June of 1981.[41]

The "pulse" of this case in regard to the admissibility of evidence pertaining to events which occurred at Buckeye's Foley plant began beating as early as June of 1988 when the district court first ruled that such evidence would not be admitted. Thus, long before the offer of proof on which the Eleventh Circuit focused its attention was made, the trial court

[40]Appendix Vol. 1 at 17. The Eleventh Circuit went on to cite with approval two cases holding such evidence to be admissible.

[41]This comes from Hughes's deposition which is part of the record in this case. R-3-83.

was thoroughly familiar with the type of evidence Plaintiffs wanted to introduce.

In addition, Hughes's testimony was brought up at the status conference held on August 31, 1988,[42] at which time Buckeye again objected to introduction of evidence regarding what allegedly occurred at the Foley plant and, *a fortiori*, any testimony of Hughes regarding that topic. The district court noted that it had already ruled that evidence regarding alleged discriminatory incidents at Foley would not be admitted. Plaintiffs responded that Hughes had information about managers, who worked at the Foley plant and were transferred to the Flint River plant, which established prejudice and racial animus. In view of that comment, Buckeye pointed out to the district court that virtually all of Hughes's deposition testimony dealt with managers other than managers who worked, at any time, at the Flint River plant.

It was with this information and history in mind that the district court, just prior to Hughes's testifying,[43] again sustained Buckeye's objection to evidence regarding events which occurred at the Foley plant. This ruling, in turn, led to the offer of proof which was addressed by the Eleventh Circuit.[44]

During the course of the offer of proof, Plaintiffs explained that there were two issues. The first was that there were alleged discriminatory acts and derogatory comments made by Flint River managers[45] during a period of time when they

[42]R11-156-6-10.

[43]Hughes testified at length regarding all incidents which he viewed as discriminatory while he was employed at the Flint River plant. (R36-5216-72; 5286-93).

[44]This offer of proof was made in the absence of Buckeye's trial counsel and, therefore, its significance is not as clear as it might have been.

[45]Because of the false implication raised in the summary of the offer of proof, as presented to the Eleventh Circuit, Buckeye wants to clarify for the record that no current or former Buckeye employee, including Hughes, ever accused Burt Richards of using racial epithets or making other derogatory

worked at the Foley plant.[46] The second issue was that the Flint River manager, Burt Richards, discriminated against black employees, during the period he was a manager at the Foley plant, by terminating them.[47] As to the first issue, Buckeye had repeatedly objected to the introduction of any evidence that pertained to managers other than managers at the Flint River plant.[48]

It is readily apparent to anyone who reviews the offer of proof that Plaintiffs were attempting to influence and inflame the jury by presenting evidence of alleged use of racial epithets and discriminatory conduct even though it had nothing to do with any manager who worked at the Flint River plant. Plaintiffs simply wanted to infer guilt by association by arguing that these alleged comments and activities occurred at the Foley plant and, as a result, any manager who worked at the Foley plant at any time would be tainted, if not guilty, of this alleged misconduct. The district court did not allow this and determined that it was not going to try all of these other claims of discrimination which occurred at another plant. Thus, the district court, relying on Rule 403, held that such evidence would unduly prolong the trial and was needlessly cumulative.[49]

comments regarding blacks.

[46]According to Hughes, many of these alleged comments and incidents occurred as far back as 1973, more than six years prior to employees even being hired for the Flint River plant and were not attributable to any manager who worked at Flint River. In fact, many of them were not attributable to any manager but to hourly employees.

[47]Buckeye had previously submitted to the district court that, if such a general statement regarding Richards's allegedly discriminatorily terminating blacks while at Foley was admitted, then Buckeye would be forced to produce evidence regarding any termination of a black employee in which Richards was involved. Thus, if there were twenty-three such terminations, as Hughes indicated, then Buckey would have had to produce evidence regarding all twenty-three terminations.

[48]August 31, 1988 status conference; R11-156-6-10.

[49]R35-5167-69.

Even though the district court did limit the admissibility of this evidence, the district court still left the door wide open for Plaintiffs to use any information they had as to any Flint River manager, regardless of where or when it occurred, for impeachment purposes. Thus, Plaintiffs had a standing invitation to introduce any relevant evidence they had regarding any Flint River manager who had anything to do with the case being tried.

There is no dispute in any circuit that district courts are granted broad discretion in ruling on evidentiary matters coming within the purview of Rule 403.[50] Thus, the only real question before this Court is whether or not the Eleventh Circuit erred by finding that there was no clear abuse of discretion when the district court limited Plaintiffs as to what evidence could be introduced regarding events occurring at the Foley plant.

In reaching this conclusion, the Eleventh Circuit noted that the district court found that the trial would be unduly prolonged if the district court had to try discharge cases and other claims of discrimination which occurred at another time and another place. The Eleventh Circuit also observed that the district court even went so far as to state that it might be willing to prolong the trial, if Plaintiffs were able to show that these occurrences at the Foley plant had some special significance to the case being tried. Plaintiffs were either unable or unwilling to do that. Finally, the Eleventh Circuit recognized that the

[50] *Harrison v. Sears, Roebuck and Co.*, 981 F.2d 25 (1st Cir. 1992); *In Re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831 (2d Cir. 1992); *Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184 (3d Cir. 1990); *Estate of Larkins v. Farrell Lines, Inc.*, 806 F.2d 510 (4th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987); *Johnson v. Ford Motor Co.*, 988 F.2d 573 (5th Cir. 1993); *In Re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1982); *Wallace v. Mulholland*, 957 F.2d 333 (7th Cir. 1992); *Greenwood Ranches, Inc. v. Skie Const. Co.*, 629 F.2d 518 (8th Cir. 1980); *Hill v. Rolleri*, 615 F.2d 886 (9th Cir. 1980); *Durtsche v. American Colloid Co.*, 958 F.2d 1007 (10th Cir. 1992).

district court had provided the Plaintiffs with the opportunity to introduce any relevant evidence pertaining to occurrences at the Foley plant, if Plaintiffs used such information for impeachment purposes.[51] Based on that, the Eleventh Circuit concluded that the district court's limited ruling on the admissibility of portions of Hughes's testimony was not an abuse of discretion. Buckeye submits that the Eleventh Circuit's holding and the underlying ruling of the district court were correct, in keeping with Rule 403 and applicable case law, and that the Plaintiffs have provided no persuasive reason why this Court should review that decision.

3. Since All Of The Plaintiffs Failed To File A Charge Of Discrimination With The EEOC Within 180 Days Of The Last Application Of The Neutral Policy, *i.e.*, Receipt Of Their Last Career Plan, Their Claims Of Disparate Impact Under Title VII Are Time Barred.

It is axiomatic that a charge of discrimination must be filed with the EEOC within the time limits set forth in 42 U.S.C. § 2000e-5(e)[52] in order to maintain a viable Title VII claim in district court. It is also well settled that the charge must be filed within 180 days of the "discriminatory act." *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977); *Delaware State College v. Ricks*, 449 U.S. 250 (1980). This is true even though such a prior discriminatory act may continue to affect an employee's present wages and fringe benefits. Such a continuing effect does not constitute a continuing violation of Title VII. *Evans, supra*.

[51] Appendix Vol. 1 at 19-20.

[52] 42 U.S.C. § 2000e-5(e) provides, "A charge under this section shall be filed within 180 days after the alleged unlawful employment practice occurred. . . ." Since there is no deferral issue involved, the 180-day limitation period applies.

Based on these considerations, Buckeye, during the course of the bench trial of the Plaintiffs' Title VII disparate impact claims,[53] reiterated its defense that Plaintiffs' claims were barred by the applicable statute of limitations. Buckeye pointed out to the district court that this Court had recently confirmed, in *Lorance v. A T & T Technologies, Inc.*, 490 U.S. 900 (1989), the distinction between a continuing violation, *i.e.*, an act which constitutes a present violation of Title VII, and those claims which are based on a discrete act which simply have a continuing effect on the aggrieved party. Buckeye demonstrated to the district court that the alleged violations were not continuing violations since there had been no application of the challenged neutral policy within 180 days of the dates on which the Plaintiffs filed their EEOC charges. Plaintiffs chose not to respond to any of the arguments and evidence produced by Buckeye in support of its statute of limitations defense. Indeed, at no time during the district court proceedings or on appeal did Plaintiffs even assert, much less establish, that any one of the Plaintiffs had filed a charge of discrimination within 180 days of the receipt of the most recent career plan.[54]

[53]Plaintiffs routinely erroneously refer to the "trial" of this case as that portion of the case involving the presentation of testimony to the jury during the months of September, October, November and December of 1988. The trial of this case commenced on September 6, 1988, and continued until June 4, 1991, at which time the district court issued its final order regarding disparate impact.

[54]The only response to Buckeye's argument was provided by Plaintiffs in one of their briefs submitted to the district court during the trial of this aspect of the case. Plaintiffs rebuttal of the statute of limitations defense verbatim, *in toto*, was as follows:

> DEFENDANT'S ARGUMENTS REGARDING THE UNTIMELINESS OF THE PLAINTIFFS' SUITS. As Defendant recognizes in its brief (pages 2-3) the issues raised there have already been dealt with by this Court. Plaintiffs do have a comment to show the absurdity of Defendant's argument: under the theory espoused by Defendant, a company could set up a pay system to pay all blacks $1.00 an hour and all whites $100.00 per hour for

It would appear that Plaintiffs' Petition sets forth three theories for reversal of the Eleventh Circuit's holding that the claims were time barred. These are as follows:

A. The discriminatory act constitutes a continuing violation because (1) the effects of the discriminatory act, *i.e.*, the receipt of a lower paycheck, constitutes a new violation each time a paycheck is received, or (2) the wage freeze, which was instituted in October of 1984, resurrects the untimely charges because the wage freeze continued the effects of the prior discriminatory acts.[55]

B. The statute of limitations should have been tolled.

C. Buckeye waived its statute of limitations defense.

Buckeye will address each of these issues.

performing the same job. Then, if it safely got past a six month threshold, the blacks would be forever barred from suing to change the effects of the pay system. It is hard to believe that Defendant wasted 30 pages of its brief on an issue which has been litigated to death and decided by this Court. Plaintiffs will not rise to the bait and so decline to respond further. (1SR1(1991)-225-5).

[55]It also appears that Plaintiffs may be claiming that the Eleventh Circuit erred in requiring that a charge of discrimination be filed within 180 days of the first instance on which an alleged discriminatory policy is applied. Since the Eleventh Circuit did not say that and, indeed, said just the opposite, Buckeye will not address that contention, if, indeed, it is a contention. The Eleventh Circuit clearly relied on the fact that last application of the contested policy did not occur within 180 days of the filing of the charges and specifically noted that, "Indeed, Appellants do not contend that the P&P system was applied to any Appellant within the limitations period." (Appendix Vol. 1 at 31).

A. The Acts Complained Of By Plaintiffs Do Not Constitute A Continuing Violation.

Plaintiffs' claim that there is conflict between the Eleventh Circuit and the other circuits and with this Court regarding the distinction between a time barred discriminatory act which continues to adversely affect an employee and a "continuing" violation. It is clear, however, that the Eleventh Circuit's opinion in this case is in complete accord with this Court's decisions which emphasize that the crucial element in such cases is establishing when the "discriminatory act" occurred. There also is no conflict between the Eleventh Circuit and the other circuits as to the significance of this Court's decisions, including *Evans*, *Lorance* and the other cases regarding the distinctions which must be made in regard to continuing effects, as opposed to continuing violations. For example, in *Jensen v. Frank*, 912 F.2d 517, 523 (1st Cir. 1990), the court cautioned that, "[C]ourts must be careful to differentiate between discriminatory acts and the ongoing injuries which are the natural, if bitter, fruit of such acts."[56]

As the Eleventh Circuit noted, it had applied the traditional continuing violation analysis, as developed by this Court

[56] *See Gilbert v. City of Cambridge*, 745 F. Supp. 42 (D. Mass. 1990), *aff'd* 932 F.2d 51 (1st Cir. 1991); *Fleming v. N.Y. Univ.*, 865 F.2d 478 (2d Cir. 1989); *Jewett v. International Tel. and Tel. Corp.*, 653 F.2d 89 (3d Cir.), *cert. denied*, 454 U.S. 969 (1981); *Bronze Shields Inc. v. N.J. Dep't of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982); *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1992), *cert. denied*, — U.S. —, 112 S. Ct. 1997, 118 L. Ed. 2d 593 (1992); *Hamilton v. 1st Source Bank*, 928 F.2d 86 (4th Cir. 1990); *Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993); *Hendrix v. City of Yazoo City, Miss.*, 911 F.2d 1102 (5th Cir. 1990); *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993); *Dixon v. Anderson*, 928 F.2d 212 (6th Cir. 1991); *E.E.O.C. v. City College of Chicago*, 944 F.2d 339 (7th Cir. 1991); *O'Shea v. City of San Francisco*, 966 F.2d 503 (9th Cir. 1992); *Ward v. Caulk*, 650 F.2d 1144 (9th Cir. 1981); *Purrington v. University of Utah*, 996 F.2d 1025 (10th Cir. 1993).

and the other circuits.[57] Curiously, Plaintiffs do not address this issue. Plaintiffs simply try to circumvent the reasoning of the Eleventh Circuit by claiming that *Bazemore v. Friday*, 478 U.S. 385 (1986) precludes such an analysis. As the Eleventh Circuit noted, however, Plaintiffs' reliance on *Bazemore* is misplaced. *Bazemore* holds that, "Each week's paycheck that delivers less to a black than to a *similarly situated* white is a wrong actionable under Title VII. . . ."[58]

The fallacy of Plaintiffs' argument is that, as soon as the employees received different career plans, they were no longer "similarly situated." Indeed, it is the very difference in the career plans about which Plaintiffs are complaining. Plaintiffs do not now nor have they ever contended that blacks and whites with the same career plans were treated differently. Their whole argument is that whites got better career plans and, therefore, the career planning process had a disparate impact on the blacks.

Stated another way, in order to maintain a disparate impact claim, the Plaintiffs cannot be contending they were paid less because they were black, *i.e.*,, the holding in *Bazemore*, but can only contend that they were paid less because of the career plans they received. The triggering event, *i.e.*, the discriminatory act, must, therefore, be when the Plaintiffs received their career plans.

Even the most cursory of readings of *Bazemore* establishes the clear distinction between that case and the present case. Indeed, as was noted by the Eleventh Circuit, this Court in *Lorance* emphasized the distinction between a facially discriminatory policy and a facially neutral policy. In *Bazemore*, there was no dispute that the policy in question was to pay black employees less than white employees who were performing the exact same job. The reason, and the only reason, that the black

[57]Appendix Vol. 1 at 29.

[58]478 U.S. at 395. (Emphasis added).

employees were paid less was because they were black. That is why this Court noted the distinction in *Lorance* and emphasized that a facially discriminatory policy, by definition, discriminates each time it is applied. The *Lorance* Court went on to note that, "This is a material difference for purposes of the analysis we employed in *Evans* and *Ricks*—which focuses on the timing of the *discriminatory* acts for purposes of the statute of limitations."[59]

Plaintiffs in this case must, by the very nature of their claim, acknowledge that they were not similarly situated to those whites who were receiving a higher rate of pay because they had different career plans. By definition, the Plaintiffs had to be dissimilarly situated, *vis-a-vis* career plans, to those whites who were receiving higher pay since it was the career plan which dictated what the pay would be.[60]

The record in this case makes it abundantly clear that Plaintiffs' entire case rests on the premise that they were not similarly situated because they received less valuable career plans. For example, one of the Plaintiffs, Plant, testified about the pay disparity as follows:

> [I complained] [a]bout the blacks in Unit I. . .being kept on the lower pay curves because they don't have

[59] *Lorance v. A T & T Technologies, Inc.*, 490 U.S. at 912 n.5. (Emphasis in original).

[60] The district court noted:

> When establishing a technician's pay curve, Buckeye primarily considered the career plans, the skills contained therein, and the points assigned to those skills. Buckeye's system considered all of the skills contained in the career plan, before they were acquired and whether or not they were ever acquired.
>
> * * *
>
> The second career plans also contained primary, secondary and cross skills which were to be learned by the technician, and they were the essential ingredient in establishing a technician's pay curve. (Appendix Vol. 1 at 66, 70).

> anything in the career plans. The career plans dictated what you got paid. If you don't have anything in your career plans, it would justify you not getting paid a higher level.[61]

There was similar testimony from every other Plaintiff involved in this case.[62] Plaintiffs' first argument as to why the violation is a continuing violation is, therefore, contradicted by their own testimony. Buckeye submits that *Bazemore* is not applicable to the instant case and that the Eleventh Circuit's reasoning, unchallenged by Plaintiffs, is correct and needs no review by this Court.

Plaintiffs' second argument, *i.e.*, that the pay freeze creates a continuing violation, warrants little discussion. Plaintiffs' claim that the pay freeze converted the violation into a "continuing violation" because it perpetuated the effects of the career plans. The Eleventh Circuit rejected this argument, and rightfully so, since it is clear that the decisions of this Court have unequivocally established that such a facially neutral act

[61]R13-387-88.

[62]Ross complained that blacks were lacking various skills in career plans (R36-5345-47; Exhibit D-3 at 4); Porter testified that he was not allowed to have a career plan that had any real value to it (R28-3764); Slaughter testified that the whites were doing different jobs since the whites had more in their career plan than he did (6SR-9-83-84); one of Herring's complaints was that she had a skill area removed from her career plan which dropped her a pay curve (1SR1/1991-197-9); Scott testified that "in order to advance up a pay curve significantly, you had to have a very good career plan, and having talked to several technicians and had asked them what their career plans were, I knew that, from it, that you could not progress very well with the career plan I had." (R22-2304); White testified that he knew that the differences in the career plans is what established the differences in the pay (R24-2902-03); Taylor thought he was discriminated against because he did not have a particular skill in his career plan (R39-5853); Palms testified that he knew that removing a skill area from his career plan would drop him a pay curve (D-14 at 14); Homer testified that he knew, as a result of the career plans, that whites were on higher pay curves and the blacks on lower pay curves (R18-1562-3).

does not resurrect an untimely charge and provide a basis for a valid claim.

The *Lorance* Court specifically addressed this issue and confirmed the holding in *Evans* that a facially neutral act does not make a prior discriminatory act timely, even though it may give a present effect to a past act of discrimination. The *Lorance* Court went on to note that, "Petitioners in the present case have asserted a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations, and cannot complaint of a continuing violation."[63]

As noted by the Eleventh Circuit, the pay freeze applied to every employee in the plant. In addition, Plaintiffs never claimed there was any discriminatory motive in implementing the pay freeze. The Eleventh Circuit's conclusions regarding the pay freeze are, therefore, legally correct and warrant no review.

B. Since The Plaintiffs In This Case Had Ample Information Months, If Not Years, Prior To The Dates On Which They Filed Their Charges Of Discrimination, There Is No Basis For Tolling The Statute Of Limitations.

After this case had been briefed and argued, the Eleventh Circuit, on July 31, 1992, requested that supplemental briefs be submitted regarding the specific issue of equitable tolling. Plaintiffs filed four supplemental letter briefs[64] and Buckeye filed two.[65] Thus, the parties were provided more than ample

[63]*Lorance v. A T & T Technologies, Inc.*, 490 U.S. at 908.

[64]Supplemental letter briefs dated August 14, 1992, September 4, 1992, and September 28, 1992; Response to Buckeye's letter brief dated September 1, 1992.

[65]Supplemental Brief dated August 24, 1992 and Reply to Plaintiffs' Supplemental Brief dated September 18, 1992.

opportunity to present all of the facts and legal arguments regarding this issue to the Eleventh Circuit.[66]

The Eleventh Circuit reviewed these facts and concluded, in accordance with the applicable case law, including this Court's decision in *Zipes v. TransWorld Airlines, Inc.*, 455 U.S. 385 (1982), that the Plaintiffs had more than ample information to support a charge of discrimination long before they actually filed their charges.[67]

Since the Plaintiffs do not even contend that the Eleventh Circuit misinterpreted or misapplied the law in reaching its holding that the statute of limitations was not tolled, Buckeye will not respond further. Plaintiffs' own argument, and lack thereof, establishes that there is no reason for this Court to review this issue.

C. The Statute Of Limitations Defense Was Not Waived.

Plaintiffs contend that Buckeye waived its right to raise the statute of limitations defense. This argument also warrants little discussion. There is no question that the statute of limitations defense was raised in Buckeye's answer to each of Plaintiffs' complaints. Indeed, in one of Plaintiffs' supplemental letter briefs to the Eleventh Circuit,[68] they quoted detailed

[66]For example, Buckeye's Supplemental Brief consisted of fifty pages. Approximately forty-five of those pages dealt with the facts contained in the record on appeal which established that the Plaintiffs were fully aware of the effect of career plans, that whites had "better" career plans and that whites were being paid more as a result of those career plans.

[67]The Eleventh Circuit listed some, but by no means all, examples of admissions of Plaintiffs that they were aware of the alleged discriminatory effect of the career plans many months, and even years, prior to the date on which they filed their charges. (Appendix Vol. 1 at 50-51. *See also* note 62, *supra*, which contains examples which occurred in 1981, 1982 and 1983.)

[68]September 14, 1992 Supplemental Letter Brief.

language from the answers showing that the statute of limitations defense was specifically and unmistakably set forth.

The statute of limitations issue was also raised in pretrial proceedings. At the status conference held on August 31, 1988, the district court raised a question about disparate impact. Buckeye's counsel responded, "I think the disparate impact theory is admissible, your Honor. I think we've got certain limits and certain problems with it. I don't think [Plaintiffs have] any basis for recovering under career plans since that is clearly outside the statute of limitations."[69] Also, contrary to the Plaintiffs' inference, the statute of limitations issue was raised in Buckeye's Motion for Directed Verdict as to the § 1981 claims.[70] In that motion, Buckeye did not address the Title VII disparate impact claims since they were to be resolved at a later date.[71]

The Eleventh Circuit reviewed this waiver argument in detail and rejected it. Plaintiffs again have failed to present to this Court any legal basis for concluding that the Eleventh Circuit erred. There is, therefore, nothing before this Court for review.

[69]R11-156-3-4.

[70]Buckeye submitted to the district court that the allegations raised by Plaintiffs did not constitute continuing violations and that they were separate and distinct acts which fell outside of the statute of limitations applicable to § 1981. (R3-95-14-16).

[71]The district court had informed the parties on several occasions, including December 12, 1988, that the district court planned to continue the bench trial of the disparate impact issues after the jury trial portion had been completed. (R55-8922-24).

CONCLUSION

Based on the foregoing arguments and cited authorities as to each issue raised by Petitioners, Buckeye respectfully submits that the Petition for Writ of Certiorari should be denied in its entirety.

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